9 -5771

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

HAROLD RAY WADE, JR.,

Petitioner,

V.

UNITED STATES OF AMERICA,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

COMES NOW, the Petitioner, by and through his undersigned counsel of record, pursuant to the provisions of Rule 39 of the Rules of the Supreme Court of the United States and respectfully prays the Court that he be given leave to proceed in this Court in forma pauperis. In support of such motion, the undersigned respectfully shows unto the Court as follows:

(1) The undersigned was appointed to represent the Petitioner pursuant to the provisions of the Criminal Justice Act of 1964, as amended, by the United States Court of Appeals for the Fourth Circuit.

(2) The undersigned has been directed by the Petitioner, pursuant to the provisions of I.O.P. 46.3 of the United States Court of Appeals for the Fourth Circuit, to prepare and to file a petition for a Writ of Certiorari with this Court.

(3) The Petitioner has been previously adjudicated to be indigent.

91-5771

WHEREFORE, the Petitioner respectfully prays the Court that he be allowed to proceed in forma pauperis.

This the 10th day of September, 1991.

J. Matthew Martin
Attorney for Petitioner
Harold Ray Wade, Jr.

OF COUNSEL:
Martin & Martin, P.A.
102 North Churton Street
Hillsborough, N.C. 27278
(919) 732-6112

91-5771

NO.

IN THE

Supreme Court of the United States

October Term, 1991

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HAROLD RAY WADE, JR.,

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v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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9

QUESTION PRESENTED FOR REVIEW

I. Whether a Federal District Court has the power to review the United States Attorney's decision not to file pleadings pursuant to Section 5K1.1 of the Sentencing Guidelines for a downward departure at sentencing even to determine whether such decision is based upon arbitrariness or bad faith?

PARTIES TO THE PROCEEDING:

Harold Ray Wade, Jr.,

Petitioner

United States of America,

Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

SUPREME COURT CASES

OTHER FEDERAL CASES

STATUTES AND REGULATIONS

OPINION BELOW

United States v. Wade, 936 F.2d 169 (4th Cir. 1991) is reprinted in the appendix hereto.

GROUNDS FOR JURISDICTION

The decision of the Court of Appeals for the Fourth Circuit was issued on June 12, 1991.

No motion for rehearing was filed. There have been no motions submitted to this Court for extension of time within which to file this Petition for Writ of Certiorari.

Jurisdiction to conduct the requested review is conferred upon this Honorable Court by 28 U.S.C. Section 1254 (1).

STATUTES AND GUIDELINES INVOLVED IN THIS CASE

18 U.S.C. Section 3553(e) provides as follows:

Limited authority to impose a sentence below a statutory minimum
Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

28 U.S.C. Section 994(n) provides as follows:

The Commission shall assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense.

Policy Statement 5K1.1, United States Sentencing Commission Manual provides as follows:

Section 5K1.1 Substantial Assistance to Authorities (Policy Statement)

Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.

(a) The appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following:

(1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;

(2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;

(3) the nature and extent of the defendant's assistance;

(4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;

(5) the timeliness of the defendant's assistance.

STATEMENT OF THE CASE

Alamance County, North Carolina authorities arrested the petitioner, Harold Ray Wade, Jr., on October 30, 1989, after a search of his home and out-building disclosed drugs and guns. The petitioner immediately began cooperating with the law enforcement officials, both State and Federal. The results of this cooperation were fruitful, resulting in the identification and capture of co-conspirators as well as in the identification and investigation of unrelated drug offenses and offenders. The Grand Jury for the Middle District of North Carolina returned a four count indictment against the petitioner on November 28, 1989, charging in count one conspiracy to possess with intent to distribute cocaine, in violation of Title 21 U.S.C. Section 846. Count two charged possession with intent to distribute cocaine, in violation of Title 21 U.S.C. Sections 841(a)(1) and (b)(1)(B). Count three charged distribution of cocaine, in violation of Title 21 U.S.C. Sections 841(a)(1) and (b)(1)(C). Count four charged the use and carrying of a firearm in relation to the drug trafficking crime pursuant to Title 18 U.S.C. Section 924(c)(1).

The petitioner entered pleas to all counts on March 5, 1990, and March 7, 1990. The Presentence Report delivered to the court noted the immediate and total cooperation of the petitioner. Nonetheless, despite the fact that the petitioner's cooperation was made voluntarily and within a matter of minutes following his arrest, it was done without a plea bargain agreement. Ultimately, the government neither filed a motion pursuant to Section 5K1.1 of

the Federal Sentencing Guidelines nor otherwise commented on the petitioner's cooperation at sentencing.

On May 11, 1990, the district court held a sentence hearing, but would not allow the petitioner to address the court with regard to the issue of his cooperation with law enforcement officers in the context of a downward departure. The district court sentenced the petitioner to the minimum mandatory sentence: 120 months followed consecutively by 60 months. The court informed the petitioner that it was of the opinion that it had neither the authority to hear such evidence nor the power to depart downward in the absence of the government's pleadings pursuant to Section 5K1.1 of the Federal Sentencing Guidelines. "Well, I believe I'm going to let you make some law with that case because I do not believe so, and I hold I do not have that authority. You may appeal that belief that I feel I would--that I am opposing this sentence contrary to law because I don't believe that I can depart upon your motion for substantial assistance below the mandatory minimum." (Transcript pp. 5-6)

On June 12, 1991, the United States Court of Appeals for the Fourth Circuit affirmed the ruling of the district court and held that absent a governmental motion for downward departure pursuant to Rule 5K1.1 of the Federal Sentencing Guidelines, the district court has absolutely no authority to look into government's reasons for its refusal to move for downward departure and may not, on its own depart downward.

> **absent a motion filed by the government, the district court has no authority to depart downward from a mandatory minimum sentence for the substantial assistance of the defendant, and the defendant is not entitled to an explanation for the government's refusal to make the motion or for its refusal to enter into an agreement to make the motion.**

United States v. Wade, 936 F.2d 169, 173 (4th Cir. 1991).

REASONS FOR GRANTING WRIT

The district courts' interpretation of Section 5K1.1 of the Federal Sentencing Guidelines directly affects the relationship between the court and the parties at sentencing for many cooperating defendants. A split in the circuits has recently developed on the issue of whether a district court has the right to review the government's decision not to move for a downward departure in sentencing. As noted, the Fourth Circuit Court of Appeals has ruled that a defendant may not question the governnment's refusal to move for a departure under Section 5K1.1, and the district court may not grant a departure in the absence of such a motion. United States v. Wade, 936 F.2d 169 (4th Cir. 1991).

Other circuits have agreed. United States v. Huerta, 878 F.2d 89 (2nd Cir. 1989), cert. denied __ U.S. __, 110 S.Ct. 845, __ L.Ed.2d __ (1990), See also, United States v. Severich, 976 F.Supp. 1209 (S.D. Fla. 1988), aff'd, 872 F.2d 434 (11th Cir. 1989); United States v. Romolo, 937 F.2d 20 (1st Cir. 1991); United States v. Long, 936 F.2d 482 (10th Cir. 1991). Conversely, four other appellate courts have recognized the district court's power to

review the government's decision not to move for a downward departure in sentencing, at least in certain circumstances.

In an equally divided en banc decision, the Eighth Circuit in United States v. Gutierrez, 908 F.2d 349 (8th Cir. 1990) held that "section 5K1.1 does not limit courts from considering a defendant's assistance to authorities and granting a downward departure from the Guidelines range for such assistance." Id. at 355. Furthermore, it said "that the defendant provided assistance warranting departure is a finding of fact reviewable under the clearly erroneous standard." Id. Although the rules of the Eighth Circuit provide that an equally divided en banc ruling has no value as precedent, the clear trend in that Circuit by virtue of Gutierrez is to look into the circumstances of a defendant's assistance in the context of section 5K1.1, of the Sentencing Guidelines when appropriate to consider whether the government's refusal was unreasonable. Accord United States v. Smitherman, 889 F.2d 189, 191 (8th Cir. 1989), cert. denied, __ U.S. __, 110 S.Ct.1493, 108 L.Ed.2d 629 (1990); United States v. Justice, 877 F.2d 644, (8th Cir.), cert. denied, __ U.S. __, 110 S.Ct. 375, 107 L.Ed.2d 360 (1989); United States v. Hubers, 938 F.2d 827 (8th Cir. 1991) (examining the circumstances surrounding the cooperation for bad faith or arbitrariness).

The reasoning of this line of thought has been persuasive:

> This case is therefore similar to the Justice case in which the Eighth Circuit, in affirming the refusal to depart, observed that the defendant did receive some benefit as a result of his cooperation--in that case from a plea bargain to a lesser charge. Accordingly, we conclude, as

> the Eighth Circuit did in Justice, that while there may be extreme situations in which the defendant's reliance on the government's inducements may permit a downward departure in the absence of a government motion, this is not such a case. A departure based exclusively upon cooperation with the government in this case would have amounted to unwarranted interference with the discretion committed to the prosecution under section 5K1.1 See United States v. Ayarza, 874 F.2d 647, 652 (9th Cir. 1989), cert. denied, __ U.S. __, 110 S.Ct. 847, 107 L.Ed.2d 841 (1990) (section 5K1.1 intended to "lodge some sentencing discretion in the prosecutor").

United States v.Mena, 925 F.2d 354, 356 (9th Cir. 1991). Thus, it appears the Ninth Circuit has held that a district court could depart downward in a sentence without the government's motion, if the government exercised bad faith in refusing to move for departure, or was arbitrary in its decision-making process, in evaluating and considering the defendant's assistance.

Recently, the District of Columbia Circuit in United States v. Doe, 934 F.2d 353 (D.C.Cir. 1991) held that the District Court erred in reviewing a decision not to depart under the arbitrary and capricious standard, and then noted:

> It does not follow, however, that all review of a prosecutor's decision not to move for departure should be precluded. Rather, we believe that limited review would be available under the same standards currently employed by district courts to review other matters committed to prosecutorial discretion.

Id. at 361. Moreover, the court said,

> Despite the broad latitude traditionally accorded to prosecutors regarding matters within their unique competence, . . . courts will intervene where a prosecutor attempts to penalize a defendant for exercising his legally protected rights, . . . or where the prosecutor bases his decision 'upon an unjustifiable standard such as race, religion, or other arbitrary classification.' . . . In addition to reviewing a prosecutor's actions for vindictiveness or

> invidious selectivity, courts will also ensure that the government honors contractual commitments with defendants. . . . We deem these limited principles of review equally applicable to the government's exercise of its discretion under section 5K1.1 to move for departures.

Id. (citations omitted); cf. United States v. Conner, 930 F.2d 1073 (4th Cir. 1991); United States v. Daniels, 929 F.2d 128 (4th Cir. 1991); United States v. Rexach, 896 F.2d 710 (2nd Cir. 1990) (holding that the decision of the government not to move for a downward departure is reviewable under principles of contract law when the talisman of Section 5K1.1 is invoked within a plea agreement).

The Fifth Circuit has noted, "Congress directed the Commission to 'assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed... to take into account a defendant's substantial assistance in the investigation of prosection of another person who has committed an offense.'" United States v. White, 869 F.2d 822, 828 (5th Cir.) cert. denied, ___ U.S. ___, 109 S.Ct. 3172, 104 L.Ed. 2d 1033 (1989). (Citing 28 U.S.C. Section 994(n)). In construing the policy statement of section 5K1.1 of the guidelines, the White Court held, "This policy statement obviously does not preclude a district court from entertaining a defendant's showing that the government is refusing to recognize such assistance." Id. at 829.

To rule otherwise, that the prosecution's reasons for refusing to move for departure, in spite of the defendant's documented diligence, are forever shuttered from review, would violate due

process.

> When a defendant has rendered substantial assistance to law enforcement but the government refuses to file the requisite motion, the sentence the Court is required under law to impose will not be based on true and accurate information: those factors that, because of the cooperation, would call for a reduction in the otherwise mandatory sentence will not be before the Court, and the Court will have to sentence as if the defendant had not rendered such assistance. The defendant is also precluded from questioning the proceedings leading to the imposition of the sentence or the facts relied on by the prosecution. Indeed, under the construction of section 3553(e) of Title 18 and section 5K1.1 of the guidelines espoused by the government, the prosecution could arbitrarily or for an unconstitutional reason (e.g., racial or sex discrimination) decide not to file the motion called for by these provisions, and the court could not intervene even if the defendant were able to demonstrate to it--should he be able to reach the ear of a court--that he had rendered massive assistance to law enforcement, to the point where his safety or even his life are in serious jeopardy...
>
> It is difficult to conceive of a parallel situation in the law where substantial liberty interests and consequences provided for by statute are beyond the power of inquiry by anyone.

United States v. Roberts, 726 F.Supp. 1359, 1374-1375 (D.D.C. 1989), see also United States v. Curran, 724 F.Supp. 1239, 1241-1245 (C.D.Ill. 1989).

Although no other circuits have found Section 5K1.1 of the Federal Sentencing Guidelines unconstitutional upon its face, one-half of the Eighth Circuit in Gutierrez said, "[i]f section 5K1.1 is interpreted to limit the courts to departure only on a motion

by the government, I would find that limitation to be fundamentally unfair and a violation of due process." Gutierrez, 908 F.2d at 354 (Heaney, J. dissenting). If nothing else, this is at least evidence of the changing attitude of at least one appellate court to the strictures of Section 5K1.1. One circuit has deferred the questions of the court's role in circumstances where bad faith or arbitrariness allegations are present until another day. United States v. Levy, 904 F.2d 1026, 1036 (6th Cir. 1990), cert. denied sub nom., Black v. United States, __ U.S. __, 111 S.Ct. 174, 112 L.Ed.2d 1060 (1991).

Unless the federal courts are given the power to review the government's reasons for refusing to make a motion for downward departure in sentence after a defendant has provided substantial assistance, there would be no check on the government's authority. The unfettered ability of the government to decide at whim whether to move for a downward departure in sentencing, without the check of judicial review, might result, by accident or purpose, in arbitrariness, in bad faith, or in other prosecutorial misconduct. cf. United States v. Wade, 936 F.2d 169 (4th Cir. 1991) with United States v. Hubers, 938 F.2d 827 (8th Cir. 1991) (both cases affirmed refusal to depart downward, but the Hubers court inquired into the circumstances of the cooperation, imparting an aura of fairness by subjecting all parties to the supervision of its review).

Different United States Attorneys' offices have different methods of evaluating a defendant's assistance: some use what is called a "departure committee," whose actions are done in secret.

At sentencing in Greensboro, the court did not allow any inquiry on the record as to the decision making process in the Middle District of North Carolina in general, or in this case in particular.

This court has held that the broad delegation of powers to the prosecution within the guidelines is constitutionally permissible under the separation of powers doctrine. United States v. Mistretta, 488 U.S. 361, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989). Nonetheless, the trial court retains the jurisdiction to address the conduct of those who appear in front of it in criminal cases. United States v. Lopez, 765 F.Supp. 1433 (N.D.Cal. 1991). To hold that the court lacks like powers in the guideline context, would handcuff the judge. In essence, the system of checks and balances upon which the government is predicated would be in jeopardy.

Given the split in the circuits on the question of whether the court can review a prosecutorial decision to not move for departure from the sentence under the Federal Sentencing Guidelines, it is important that this question be considered and that this Court exercise its power of supervision over the lower federal courts in administering the application of the policy statement contained in Section 5K1.1.

Undoubtedly, the Federal Sentencing Guidelines altered substantially the nature of the sentencing process in the United States District Courts. The Guidelines have left unresolved questions regarding the new relationship between the government and the Courts. This case presents an opportunity for this Honorable

Court to issue crucial guidance to all involved with regard to when, if ever, the trial court may investigate the circumstances regarding the government's refusal to move for departure pursuant to Section 5K1.1 and to what, if any, remedial action may be taken should circumstances warrant, thereby resolving a growing disparity of decisions among the Circuits.

CONCLUSION

For the foregoing reasons this Petition for the Writ of Certiorari should issue.

Respectfully submitted,

J. Matthew Martin
Counsel for Petitioner
Harold Ray Wade, Jr.

APPENDIX

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 90-5805

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

HAROLD RAY WADE, JR.,

Defendant - Appellant.

Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro. Norwood Carlton Tilley, Jr., District Judge. (CR-89-278-G)

Argued: February 8, 1991 Decided: June 12, 1991

Before ERVIN, Chief Judge, NIEMEYER, Circuit Judge, and SPENCER, United States District Judge for the Eastern District of Virginia, sitting by designation.

Affirmed by published opinion. Judge Niemeyer wrote the opinion in which Chief Judge Ervin and Judge Spencer joined.

ARGUED: J. Matthew Martin, MARTIN & MARTIN, P.A., Hillsborough, North Carolina, for Appellant. Richard S. Glaser, Jr., Assistant United States Attorney, Greensboro, North Carolina, for Appellee. **ON BRIEF:** Robert H. Edmunds, Jr., United States Attorney, Charles T. Francis, Assistant United States Attorney, Michael J. Russo, Third Year Law Student, Greensboro, North Carolina, for Appellee.

NIEMEYER, Circuit Judge:

Following his guilty plea to charges for drug distribution and related gun use, Harold Ray Wade, Jr. was sentenced to a mandatory minimum ten-year sentence for the drug charges and a consecutive mandatory five-year sentence for the gun charge. See 21 U.S.C. § 841(b); 18 U.S.C. § 924(c). In denying Wade's motion for a downward departure based on his substantial assistance to the government, the district court concluded that, in the absence of a motion made by the government under U.S.S.G. § 5K1.1, it had no authority to depart from the mandatory minimum sentences.

On appeal, Wade contends that (1) the district court erroneously concluded that it did not have the authority to depart downward for substantial assistance on his motion, which was supported by substantial evidence of the valuable cooperation that he provided, and (2) the court should have permitted an inquiry into the government's reasons for its refusal to make the motion under § 5K1.1 to determine whether it acted arbitrarily or in bad faith. Finding no error, we affirm.

There appears to be no disagreement on the fact that shortly after his arrest and without the benefit of a plea agreement, Wade began a course of cooperation which provided valuable assistance to the government in other prosecutions, leading to the conviction of co-conspirators. Yet, with some disillusionment, he observes that the government made no comment about his cooperation at sentencing and refused to file a motion

for a downward departure under U.S.S.G. § 5K1.1. Wade brought these facts to the attention of the district court in connection with his motion for a downward departure and sought unsuccessfully to inquire of the government why it refused to make the motion. He argues that such an inquiry would have been relevant to resolve whether the government acted arbitrarily or in bad faith.

Limited authority to depart from mandatory minimum sentences is provided in 18 U.S.C. § 3553(e), which provides:

> Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

See also 28 U.S.C. § 994(n) ("The Commission shall assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed."); U.S.S.G. § 5K1.1. Section 5K1.1 governs all departures from guideline sentencing for substantial assistance, and its scope includes departures from mandatory minimum sentences permitted by 18 U.S.C. § 3553(e). See Application Note 1 to § 5K1.1; United States v. Keene, ___ F.2d ___, No. 89-50617 (9th Cir. Apr. 29, 1991). The unambiguous language of 18 U.S.C. § 3553(e) leads to the single conclusion that courts may not depart downward from mandatory minimum sentences because of the substantial assistance of a defendant unless the government files a motion for departure. See, e.g., United States v. Francois, 889 F.2d 1341, 1345 (4th Cir. 1989), cert. denied, ___

U.S. ___, 110 S.Ct. 1822 (1990); United States v. Huerta, 878 F.2d 89, 91 (2d Cir. 1989), cert. denied, ___ U.S. ___, 110 S.Ct. 845 (1990). The policy of § 3553(e) is "to provide an incentive to defendants to furnish assistance to law enforcement officials" by giving the officials the right to introduce flexibility into the otherwise rigorous inflexibility of mandatory sentences. United States v. Daiagi, 892 F.2d 31, 32 (4th Cir. 1989). Although the quid pro quo of the policy involves only law enforcement officials and defendants, once a motion by the government is filed, the court must exercise discretion in determining the appropriate level of departure, which may, when justified by the facts, be more or less than that recommended by the government. See United States v. Wilson, 896 F.2d 856, 859 (4th Cir. 1990) (Sentencing Commission has not limited the district court's authority in determining the amount of a departure under § 3553(e)); United States v. Musser, 856 F.2d 1484, 1487 (11th Cir. 1988) (although the government is given the authority to make the motion for a reduction of sentence for the defendant's substantial assistance, the actual authority to reduce the sentence remains vested in the district court), cert. denied, 489 U.S. 1022 (1989). The plain statutory language, however, permits the court's consideration of downward departures for substantial assistance only after the government has made the motion. Therefor , the argument by Wade that the sentencing court is authorized to depart downward on his motion, but in the absence of a government motion, must be readily rejected.

The more difficult question raised by Wade is whether he may query the good faith of the government in refusing to make the motion. He argues that the district court should have reviewed not only the strength of the evidence showing the value of his assistance but also the reasons and motives of the government in not making the motion. Relying on United States v. Justice, 877 F.2d 664 (8th Cir.), cert. denied, ___ U.S. ___, 110 S.Ct. 375 (1989), he argues that the good faith of the government must be reviewable by the court so that the expressed Congressional policy of rewarding cooperation is not thwarted. See 28 U.S.C. § 994(n).

In Justice, where a similar argument was made, the court affirmed the district court's refusal to depart downward in the absence of a motion by the government made under U.S.S.G. § 5K1.1. In doing so, however, the court acknowledged the potential for an argument as made here by Wade:

> We believe that in an appropriate case the district court may be empowered to grant a departure notwithstanding the government's refusal to motion the sentencing court if the defendant can establish the fact of his substantial assistance to authorities as outlined above. Nevertheless, we are not prepared to decide this issue based on the record currently before us.
>
> Thus, while we are inclined to hold that a motion by the government may not be necessary in order for the sentencing court to consider a departure based on substantial assistance to authorities, we need not reach this issue.

Id. at 668-69. Justice's argument was based on the notion that 28 U.S.C. § 994(n) directs the Commission to "assure" that the Sentencing Guidelines recognize substantial assistance, and if U.S.S.G. § 5K1.1 were interpreted to deny the court's review of the

government's determinations on this issue, the Congressional mandate could be frustrated. The court left the issue open, citing United States v. White, 869 F.2d 822 (5th Cir.), cert. denied, 490 U.S. 1112 (1989), where the court observed that although it would be "the rarest of cases" in which the government would improperly fail to recognize substantial assistance, § 5K1.1 "obviously does not preclude a district court from entertaining a defendant's showing that the government is refusing to recognize such substantial assistance." Id. at 829.

The Eighth Circuit revisited the question in United States v. Smitherman, 889 F.2d 189 (8th Cir. 1989), cert. denied, ___ U.S. ___, 110 S.Ct. 1493 (1990), and again acknowledged the possibility that it would be willing to review a government's refusal to make a motion for a downward departure in the right circumstances.

> In this case, the government made no such motion. Although we have suggested that a section 5K1.1 motion might not be necessary in all cases [citing United States v. Justice], we do not view the present case as one that presents a question of prosecutorial bad faith or arbitrariness that might conceivably present a due process issue.

Id. at 191.

Our reading of 18 U.S.C. § 3553(e) and 28 U.S.C. § 994(n), however, leads us to the conclusion that the government alone has the right to decide, in its discretion, whether to file a motion for a downward departure based on the substantial assistance of a defendant. The statutory purpose of promoting defendants' cooperation with the government and the statutory restriction that

departures may be considered only on the motion of the government require an interpretation that the right to introduce flexibility into what is otherwise a mandatory sentence is given to the government for use as a prosecutorial tool which may be exercised in the sole discretion of the government. Moreover, neither 18 U.S.C. § 3553(e) nor 28 U.S.C. § 994(n) bestows on a defendant a beneficial interest that may be enforced as a right. By giving the right to request a downward departure from mandatory minimum sentences exclusively to the government, § 3553(e) of logical necessity excludes any claim of right by a defendant to demand that a motion for a departure be filed upon his unilaterally initiated cooperative efforts. See United States v. Daniels, 929 F.2d 128, 131 (4th Cir. 1991) ("In the absence of an agreement requiring the government to file [a § 5K1.1 motion for substantial assistance] the defendant has no right to demand that one be filed.").

Once we reach the conclusion that the government has the sole discretion in deciding whether to file a motion for downward departure for substantial assistance, it follows that the defendant may not inquire into the government's reasons and motives if the government does not make the motion. To conclude otherwise would result in undue intrusion by the courts into the prosecutorial discretion granted by the statute to the government.

The avenue open to a defendant for taking advantage of 18 U.S.C. § 3553(e) and U.S.S.G. § 5K1.1 is to negotiate a plea agreement with the government under which the defendant agrees to provide valuable cooperation for the government's commitment to

file a motion for a downward departure. When a defendant is able to negotiate a plea agreement that includes the government's agreement to file a motion for a downward departure under § 5K1.1, the defendant obtains rights to require the government to fulfill its promise. To those circumstances we apply the general law of contracts to determine whether the government has breached the agreement. See United States v. Connor, 930 F.2d 1073, ____ (4th Cir. 1991). If substantial assistance is provided and the bargain reached in the plea agreement is frustrated, the district court may then order specific performance or other equitable relief, or it may permit the plea to be withdrawn. Id. at ____. Cf. Santobello v. New York, 404 U.S. 257, 262 (1971) ("[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.").

While the government may have legitimate prosecutorial interests in choosing to negotiate a plea agreement and settle a prosecution with a defendant short of trial, it may also insist on a full prosecution and trial if it chooses not to negotiate or agree to terms of a plea agreement satisfactory to the defendant. The defendant's right is to be prosecuted and tried in accordance with the standards of due process and not to be given an agreement of compromise.

We therefore hold that, absent a motion filed by the government, the district court has no authority to depart downward from a mandatory minimum sentence for the substantial assistance of

the defendant, and the defendant is not entitled to an explanation for the government's refusal to make the motion or for its refusal to enter into an agreement to make the motion. The judgment of the district court is therefore affirmed.

AFFIRMED